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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1979

No. 79-119

MITCHELL G. VEITCH,
Petitioner,

VS.

SUPERIOR COURT OF THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA,
Respondent,

THE PEOPLE OF THE STATE OF CALIFORNIA,
Real Parties in Interest.

PETITION FOR A WRIT OF CERTIORARI
to the Court of Appeal of the State of California, First Appellate District, Division Two

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PETITION FOR A WRIT OF CERTIORARI to the Court of Appeal of the State of California, First Appellate District, Division Two

INTRODUCTION

Petitioner prays that a writ of certiorari issue to review the decree of the Court of Appeal of the State of California, First Appellate District, Division Two, filed on February 26, 1979.

OPINION BELOW

The opinion of the Superior Court of the State of California is printed in Appendix A hereto.

Review of same was sought by way of petition for alternative writ of mandate and/or prohibition in the Court of Appeal of the State of California, First Appellate District, Division Two, and same was denied without issuance of the alternative writ or order to show cause on October 25, 1978. A copy of said denial is printed in Appendix B hereto.

A petition for hearing was then sought in the Supreme Court of the State of California and said hearing was granted. The matter was ordered transferred to the California Supreme Court and retransferred to the Court of Appeal, First Appellate District, Division Two, with directions to issue an alternative writ of prohibition to be heard before that court when the proceeding was ordered on calendar. The decree of the Supreme Court is printed in Appendix C hereto.

The Court of Appeal of the State of California, First Appellate District, Division Two, then ordered that an alternative writ of prohibition issue as prayed for to be heard on Tuesday, January 9, 1979 before that Court. Said order is printed in Appendix D hereto. The alternative writ of prohibition is printed in Appendix E hereto.

The opinion of the Court of Appeal of the State of California, First Appellate District, Division Two is printed in Appendix F hereto, and is reported at 89 C.A.3d 722, ... Cal.Rptr. .....

JURISDICTION

The decree printed in Appendix F hereto, which is sought to be reviewed is dated February 26, 1979.

A rehearing by the Court of Appeal of the State of California, First Appellate District, Division Two, was denied on March 28, 1979. Said denial is printed in Appendix G hereto. A hearing by the California Supreme Court was denied on April 26, 1979. Said denial is printed in Appendix H hereto.

The jurisdiction of this court is invoked under Section 1257(3) of Title 28 of the United States Code.

QUESTIONS PRESENTED

Does a retrial of a defendant in a criminal proceeding violate the double jeopardy provisions of the United States Constitution when a jury has found the defendant guilty of the charges as alleged, but the trial judge vacates the verdict of the jury expressly and solely on the grounds that it is contrary to the law and to the evidence and further on the grounds of insufficiency of the evidence to support the verdict, and therefore orders a new trial?

The 5th Amendment to the Constitution of the United States provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF CASE

Your Petitioner, MITCHELL G. VEITCH, is the defendant in a certain criminal proceeding, Action 66600, now pending before Respondent, SUPERIOR COURT IN AND FOR THE COUNTY OF SANTA CLARA, STATE OF CALIFORNIA, in which the Petitioner is charged with multiple sex offenses.

On or about January 13, 1978 through February 3, 1978, the Petitioner, MITCHELL G. VEITCH was prosecuted in the SUPERIOR COURT IN AND FOR THE COUNTY OF SANTA CLARA for multiple offenses including violations of California Penal Code sections 459 (burglary), 261, subdivisions 2, 3 (forcible rape and rape by threats), 459 (burglary), 220 (assault with intent to commit rape), 288A (forciable oral copulation), 264.1 (acting in concert), and 12022 (armed with a deadly weapon). On February 3, 1978, the jury empaneled to hear the said action found your petitioner, MITCHELL G. VEITCH, guilty as charged.

Immediately thereafter to wit, on March 1, 1978, your Petitioner filed a Motion for New Trial pursuant to Penal Code Section 1181. As specific grounds for a new trial under said Penal Code Section, your Petitioner set forth Subsection 2, that the jury had received evidence out of court; Subsection 3, that the jury was guilty of misconduct by which a fair and due consideration of the case was prevented; Subsection 5, that the Court misdirected the jury in a matter of law or erred in the decision of a question of law arising during the course of the trial; Subsection 5,

that the District Attorney or other counsel prosecuting the case was guilty of prejudicial misconduct during the trial thereof before a jury; Subsection 6, that the verdict was contrary to law or evidence; and finally, Subsection 8, that new evidence had been discovered material to the defendant and which he could not, with reasonable diligence, have discovered and produced at trial. In support of said motion, your Petitioner submitted a 28-page memorandum accompanied by supporting affidavits pointing out each and every trial error which your Petitioner felt compelled a new trial.

On April 24, 1978, said Motion for New Trial was heard before the Honorable DAVID W. LEAHY, Judge of the Superior Court In and For Santa Clara County, the same judge who had presided at the trial of said action. After substantial argument by counsel in which each and every trial "error" was again urged upon the trial court, the court stated the following:

> "I don't think so, Mr. Mezzetti. The Court intends to grant the Motion for New Trial.
>
> *I want the record clear as to the reason why I'm doing it.* And I think that having you produce any further evidence with regard to what the jurors might have considered might make me feel better, but it isn't going to change anything. And there's no sense in fooling around with it.
>
> First of all, I do not consider that there was any prosecutorial misconduct, either in individual instances or cumulatively. We have an adversary system.
>
> I think both counsel in this case attempted to the best of their ability and in what I perceive to be an

honest and sincere fashion to carry out their duties. And I do not think that there was any prosecutorial misconduct.

With regard to the overall conduct of the trial, that gives me some pause, frankly. The case lengthened out for a period of some three weeks. There was illness. There were other problems. It did not go in in the nice tight fashion that I would have preferred.

With regard to my rulings on the evidence they were carefully considered, and I don't consider that there were any significant errors of law that would warrant a reversal or new trial based upon these.

Particularly, I ruled that the corporal line-up was unconstitutional, but that there was a basis for the identification apart from that. I see no reason to change that.

This case simply boils down to whether or not I can perform my function as a judge and live with my conscience. And it is the duty of a judge to weigh the evidence independently, and if the judge comes to the conclusion that the verdict of the jury is contrary to the weight of the evidence, after giving it the weight that I think is accorded the credibility of the witnesses, their manner and appearance in testifying, then it is the judge's duty to speak.

The motion for new trial is granted on the grounds of 1181-6 only." (Emphasis added by counsel, Reporter's Transcript as attached to Petition for Alternative Writ of Mandate and/or Prohibition, p. 25, lines 15-26, p. 26, lines 1-24.)

Accordingly, by order dated April 26, 1978, your Petitioner's Motion for a New Trial was granted. A copy of

said Order was attached to your Petitioner's Petition for Alternative Writ of Mandate and/or Prohibition before the Court of Appeal of the State of California. Said Order specifically states:

> "IT IS HEREBY ORDERED that the Motion for a New Trial on behalf of the defendant, MITCHELL VEITCH, is granted pursuant to California Penal Code Section 1181(6), in that the Court finds that the verdict of the jury is contrary to law and evidence.
>
> IT IS FURTHER ORDERED that the verdict of the jury is vacated and set aside, because it is contrary to the law and evidence and further on the ground of insufficiency of the evidence to support the verdict."

The People having a statutory right to appeal from an Order granting a New Trial (California Penal Code Section 1283(3)) filed no appeal and after numerous motions by your Petitioner, the matter was assigned for trial.

On July 31, 1978, your Petitioner filed a Motion for Hearing on Special Defense pleading Judgment of Acquittal of Charges pursuant to Penal Code 1016(3) or Once in Jeopardy, California Penal Code Section 1016(4). Said motion simply stated:

> "The defendant pleads he has been once in jeopardy for the offenses charged herein, and that as a matter of law, the claim of jeopardy bars a retrial."

In support of this position, your Petitioner Referred the Respondent Court to the June 14, 1978 decision enunciated by this Court, the United States Supreme Court in *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 46 U.S.L.W.

4632, which decision on the same date was held applicable to the State Courts in *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151, 46 U.S.L.W. 4636. Both decisions held that an accused may not be subjected to a second trial when his conviction at the first is reversed solely for lack of evidence to sustain the jury's verdict. This very court, the United States Supreme Court, stated the new trial would be double jeopardy.

On August 23, 1978, the Real Parties in Interest filed their points and authorities in opposition to the Motion of your Petitioner.

On September 7, 1978, the Respondent Court, the Honorable James A. Wright presiding, made its order. (Appendix A). In said order, the Respondent Court correctly pointed out that the United States Supreme Court had up until the time of the *Burks* decision held that a defendant who requested a new trial could not then set up the defense of double jeopardy and legally frustrate what he had brought about by his request. However, the decision in *Burks* the Respondent Court correctly assessed, changed all this. Quoting the language from the *Burks* decision, the Respondent Court continued:

> "Nonetheless, as the discussion in Part II supra, indicates, our past holdings do not appear consistent with what we believe the Double Jeopardy Clause commands. A close re-examination of those precedents, however, persuades us that they have not properly construed the clause, and accordingly should no longer be followed."

The Respondent Court continued in its order, distinguishing as the *Burks* decision did between reversal for

trial error, in which case the double jeopardy clause does not bar a second trial and reversal as a result of evidentiary insufficiency. The Respondent Court then again quoted language from *Burks*:

> *"The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble."* (Emphasis added.)

After analyzing the *Burks* decision and the *Greene* decision, the Respondent Court stopped short of granting your Petitioner the relief requested and distinguished those cases from the case at bench by stating that if an *Appellate Court* determines that the evidence is insufficient to sustain the verdict of the jury, then jeopardy attaches and the defendant/accused cannot be retried. However, the Respondent Court felt that because in this situation it was the Trial Court which had made such a determination, this determination was somehow less sacrosanct and therefore, your Petitioner could once again be placed in jeopardy.

Your Petitioner has no plain, speedy, and adequate remedy in the ordinary course of the law, in that if this second trial is allowed to proceed, it will frustrate the very thing which your Petitioner seeks to avoid, and that is being placed twice in jeopardy and tried twice for the very same alleged offenses.

Accordingly, on September 22, 1978, your Petitioner filed a Petition for Alternative Writ of Mandate and/or Prohibition. On October 25, 1978, the Court of Appeal of the

State of California, First Appellate District, Division Two denied the Petition for Alternative Writ of Mandate and/or Prohibition.

Thereafter, to wit, on November 6, 1978, your Petitioner filed a Petition for Hearing before Supreme Court of the State of California. By order dated November 24, 1978, said Petition for Hearing was granted, the matter was transferred to the Court of Appeal with directions to issue an Alternative Writ of Prohibition to be heard before that Court when the proceeding was ordered on calendar.

On December 1, 1978, the Court of Appeal of the State of California, First Appellate District, Division Two, issued an Alternative Writ of Prohibition to be heard before Division Two on January 9, 1979 at 10:00 a.m. On January 9, 1979, oral argument was presented to the Court of Appeal, and on February 26, 1979, the Court of Appeal filed its decision discharging the Alternative Writ and denying the peremptory. The Court of Appeal in its decision, drew the same distinction Respondent Court had drawn. That is, the Court of Appeal concluded that *Burks* stands only for the proposition that the Double Jeopardy Clause will preclude retrial if a reversal by a *reviewing court* is grounded on the fact that the evidence presented to the jury is so insufficient that the defendant was entitled to a judgment of acquittal.

With this limited interpretation, your Petitioner respectfully disagrees and submits to this Court that a retrial of petitioner will constitute forbidden double jeopardy where, as in his case, the trial court expressly stated that the verdict of the jury was contrary to law and evidence and

further, that the verdict of the jury was vacated and set aside not only because it was contrary to the law and evidence, but because there was insufficient evidence to support the verdict.

On March 13, 1979, your Petitioner filed a Petition for Rehearing before the Court of Appeal. Said petition was denied on March 28, 1979.

On April 9, 1979, your Petitioner filed a Petition for Hearing in the Supreme Court of the State of California and on April 26, 1979, said hearing was denied.

REASONS FOR ALLOWANCE OF THE WRIT

The California Supreme Court, in *Curry v. Superior Court*, 2 C.3d 707, 87 Cal.Rptr. 361, 470 P.2d 345, in commenting upon the double jeopardy standards stated that although the States must accord their citizens at least as much protection against double jeopardy as is provided under the Fifth Amendment, a State is not forbidden from according a greater degree of such protection. That the jeopardy provision of the Fifth Amendment is applicable to the States through the Fourteenth Amendment is undisputed. (*Benton v. Maryland*, 395 U.S. 784, 23 L.Ed.2d 707; *Waller v. Florida*, 397 U.S. 387, 25 L.Ed.2d 435). The *Curry* Court, supra, went on to state:

> "Both *Benton* (395 U.S. at pp. 795-796, 23 L.Ed.2d at pp. 716-717) and our opinion in *Gomez vs. Superior Court* (1958) 50 C.2d 640, 644 (328 P.2d 976) quote with approval the statement that 'The underlying idea (of the portection against double jeopardy), one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that *the State, with all its*

> *resources and power, should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.*" (emphasis added by counsel)

Your Petitioner's first trial resulted in the trial judge making it very explicit that he was granting the Petitioner's motion for a new trial *solely* on the grounds that the verdict was contrary to the weight of the evidence and because of the insufficiency of the evidence to sustain the verdict. Now the State is being allowed a second crack at your Petitioner to see if it can now produce sufficient evidence to convict your Petitioner. The Real Parties in Interest already had their chance. Your Petitioner has been subjected to embarrassment, expense and ordeal.

In California, an accused can be afforded no less protection than that guaranteed under the Fifth Amendment to the United States Constitution. In fact, California courts have been very liberal in according defendants even greater protections than those called for by the United States Supreme Court in holding that the Fifth Amendment applies to the states.

Why, then, is Petitioner's case the exception? Why, when his conviction was reversed based on insufficiency of the evidence to sustain the verdict, is he required to be once again in jeopardy when the *Burks* decision, infra, states this is exactly the kind of case where a defendant should not be subjected to such an ordeal?

As stated earlier, your Petitioner was granted a new trial after he had been convicted by a jury of violations of various California Penal Code Sections, including burglary, forcible rape and rape by threats, forcible oral copulation, and assault with intent to commit a felony. The trial judge, the Honorable DAVID W. LEAHY, stated that he had weighed the evidence independently and had come to the conclusion the verdict of the jury was contrary to the evidence and that he was therefore granting your Petitioner a new trial on the grounds of Penal Code Section 1181.6 only. He questioned whether he could perform his function as a judge and live with his conscience otherwise. His order read that your Petitioner was granted a new trial on the grounds that the verdict of the jury was contrary to the law and evidence and that there was insufficiency of the evidence to support the verdict.

This is precisely the type of situation which the United States Supreme Court in its decision of June 14, 1978 held bars a new trial for the same offenses! This court, the United States Supreme Court in *Burks v. United States,* 437 U.S. 1 began by distinguishing "trial error" from "evidentiary insufficiency" when a conviction is reversed. The court ruled:

> "In short, reversal for trial error, as distinguishing from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions,

or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished . . .

. . . *The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble* . . .

. . . *Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty* . . .

. . . *Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing Court has found the evidence legally insufficient, the only 'just' remedy available for that Court is the direction of a judgment of acquittal.*" (emphasis added)

The Court of Appeal in its decision interpreting *Burks* began by stating that your Petitioner contends that *Burks* and *Greene* stand for the proposition that the Double Jeopardy Clause precludes a second trial once a trial court has granted a motion for a new trial on the ground of insufficiency of the evidence. That was not your Petitioner's contention. Your Petitioner contends that a second trial is precluded by the double jeopardy clause once *any* court has granted a motion for new trial on the ground of insufficiency of the evidence. The evidence at the first trial was insufficient to convict the defendant.

The *Burks* Court stated that where double jeopardy clause is applicable, its sweep is absolute and there are no equities to be balanced, for the clause is declared a constitutional policy based on grounds which are not open to judicial examination. It is interesting to note that in *Burks*, the petitioner had actually made a motion for acquittal before the case was submitted to the jury, and said motion was *denied*. After the jury found petitioner guilty as charged in *Burks*, he made a motion for a new trial on the ground that the evidence was insufficient to support the verdict and that motion was denied. Thereafter, the Court of Appeal held that the Government had failed to rebut petitioner's proof and it was as a result of this decision that the United States Supreme Court held that a new trial was precluded by the double jeopardy provisions of the Constitution.

Getting back to the case at bench, if an appellate reversal as argued by the Court of Appeal in its decision (Appendix A) is to be equated with a trial court's judgment of acquittal, and the same standard is to be employed by the reviewing court as the trial court employs in ruling on a motion for acquittal (Penal Code 1118.1), then how can it be explained that in *Burks*, the trial court had before it a motion for acquittal which it *denied* and the appellate court, employing the exact same standard, held there was insufficient evidence to support the verdict and reversed? The District Court, in *Burks*, on Petitioner's motion for a new trial, held that Petitioner's challenge to the sufficiency

of the evidence was "utterly without merit." Then, the Court of Appeal, employing its "higher" and more "stringent" standard of review, agreed with Petitioner's claim that the evidence was insufficient to support the verdict. The distinction drawn by the Court of Appeal of the State of California in your Petitioner's case, when placed in the light of what actually happened in the *Burks* case, is patently invalid.

The Appellate Court of the State of California, First Appellate District, Division Two, continued in its decision with an analysis of *Greene v. Massey,* 437 U.S. 19, 98 S.Ct. 2151. That case held that the principles enunciated the same day in *Burks,* supra, were equally applicable to state courts. Specifically, *Greene* held that a state may not retry an accused after a conviction has been reversed by an appellate court on the ground that the evidence introduced at the prior trial was insufficient as a matter of law, to sustain the jury's verdict. In that case, unlike the case at bench, although the per curiam opinion in which four justices joined stated that "the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree", and that the "interests of justice required a new trial", three of the justices who had joined the per curiam also filed a "special concurrence" which, though concerned only with trial error, concluded that "for the reasons stated the judgments should be reversed and remanded for a new trial, so we have agreed to the Per Curiam order doing so."

This court, the Supreme Court of the United States held that the special concurrence left open the possibility that

three of the justices that joined in remand did so solely to give the defendants an error-free trial . . . even though they were satisfied that the evidence was sufficient to support the verdict (The three justices had been concerned that the trial court had improperly ruled on a question concerning a subpoena duces tecum, the result of which was that the defense may have been deprived of evidence to which it was entitled and further, the three justices were concerned with the improper admission of certain hearsay evidence which the concurring justices felt had "potential probative force."). Because it was unclear whether these three concurring justices felt a new trial was necessary due to insufficiency of the evidence or whether they felt it was necessary because of trial error as suggested by their concurrence, the Supreme Court remanded.

There was no question as the Court of Appeal in the case at bench states in its decision as to whether under the language of the *per curiam opinion* it could reasonably be said that the concurring justice thought that the legally competent evidence adduced at the first trial was insufficient to prove guilt. It was the *concurring* opinion, and that question was raised only because the three concurring justices had found substantial trial error in which case a reversal on those grounds would not preclude a new trial because of the double jeopardy clause. In fact, the Supreme Court of the United States expressly acknowledged:

> "If we were confronted only with the per curiam opinion of the Florida Supreme Court, reversal in this case would follow. The per curiam disposition, standing by itself, leaves no room for interpretation by us other than the majority of the State Supreme Court

was 'of the view that the evidence was definitely lacking establishing beyond a reasonable doubt that the defendants committed murder in the first degree . . .' By using a precise terminology 'lacking in establishing beyond a reasonable doubt', the highest court in Florida seems to have clearly said that there was insufficient evidence to permit the jury to convict petitioner at his first trial. The dispositive per curiam opinion makes no reference to the trial errors raised on appeal. Viewed in this manner, the reasoning enunciated in *Burks* would obviously compel the conclusion that *Greene's* second trial violated the Double Jeopardy Clause."

In the case at bench, there is no doubt at all or whatsoever that your Petitioner was granted a new trial *solely* on the ground of evidentiary insufficiency. In fact, the trial judge, the Honorable DAVID W. LEAHY, specifically stated he wanted to make it clear that that was the only reason he was granting same. There is nothing unclear or ambiguous in his order, as there was in the *Greene,* supra, 437 U.S. 19, 98 S.Ct. 2151, case. He specifically ruled out each and every ground of trial error your petitioner had asserted.

In the case at bench, it was the Trial Judge who found the evidence legally insufficient, but what difference does that make? In either case, whether it is an appellate court who reviews the decision or the trial judge who sets the verdict aside, the prosecution cannot complain if the basis of said action was due to the insufficiency of evidence. In either case, the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.

The case cited by the Real Parties in Interest, *People v. Serrato,* 9 C.3d 753, 109 Cal.Rptr. 65, 512 P.2d 289, and relied upon by the Appellate Court, is no longer controlling. This court, the United States Supreme Court has specifically stated that when a conviction is reversed because of insufficiency of the evidence, the People have no interest in reprosecuting the defendant.

The Respondent Court hinged its decision on the fact that it was a reviewing appellate court in *Burks,* supra, and *Greene,* supra, that found the evidence to be insufficient to sustain the verdict, rather than the trial judge and accordingly denied your Petitioner's motion. This distinction is without merit.

The California case of *People v. Robarge,* 41 C.2d 628, 262 P.2d 14, states that in a jury trial, the defendant is entitled to two decisions on the evidence: One by the Jury and another by the judge in ruling on a motion for a new trial under California Penal Code 1181(6). The judge acting on the motion has been called "the thirteenth juror", but neither procedurally nor in function does he occupy any such status. He does not deliberate with the jury in reaching the verdict, but makes an independent determination of his own. The trial judge does not review the jury's determination but weighs the evidence himself and exercises an independent judgment, as if there were no jury at all.

This leads to an interesting point which did not escape the Respondent Court's attention. The Respondent Court at the oral hearing asked the attorney for the People, if he did not agree, if the trial judge had presided over this

trial without a jury and *then* reached the conclusion he did reach, would that not then be a bar to further trial. The district attorney agreed it would. Continuing with the Respondent Court's reasoning then, when the trial judge weighs the evidence himself and exercises an independent judgment as if there were no jury at all, how is that so different from the situation where there is no jury at all? In the latter case, a second trial is without a doubt precluded. Why should it not be precluded in the first instance?

Secondly, the distinction drawn by the Respondent Court in deciding that the bar of double jeopardy did not apply, because in the case at bench, it was the trial judge instead of an appellate court who reversed Petitioner's conviction based on insufficiency of the evidence is highly superficial. If the People, Real Party in Interest, had chosen to appeal from the order granting the new trial and setting the verdict aside, and then the Court of Appeal had affirmed the trial judge's decision, then would the Respondent Court agree that the bar to a second trial because of having been once in jeopardy applied?

The People had a right to appeal from the order granting the new trial. (California Penal Code Section 1238(a)(3)). They did not. Your Petitioner could not force them to do so. If they had appealed and the Appellate Court had ruled that the trial judge was correct, there was insufficient evidence to sustain the verdict, then would *Burks* apply? Because the People did not appeal, and there is not the benefit of an appellate decision, is the Petitioner to be placed in the position of being retried for the same offense

simply because the Real Party in Interest did not appeal when the former verdict was set aside?

The cases of *People v. Henderson,* 60 C.2d 482, 35 Cal. Rptr. 77, 386 P.2d 677, and *In re Ferguson,* 233 C.A.2d 79, demonstrate the closeness of function between appellate reversal and trial court reversal. *People v. Henderson,* 60 C.2d 482, holds that after reversal on appeal, a defendant cannot be subjected to a different punishment. The court held this was a special form of jeopardy. *In re Ferguson,* 233 C.A.2d 79, 43 Cal.Rptr. 325, holds the same rule applies to retrial after a new trial motion is granted. In that case, a jury recommended under Penal Code Section 264, that the defendant be punished for statutory rape (Penal Code Section 261, subdivision 1) by imprisonment in a county jail. A new trial was granted, and at the second trial, he was convicted of a felony and sentenced to state prison.

The Appellate Court held that the constitutional prohibition against double jeopardy prevented the imposition of a more severe sentence on retrial. The court reasoned that in the case before them, the petitioner had obtained a retrial as a result of a motion in the trial court rather than by appeal. The *Ferguson* Court then stated that it was his right to make that motion, and under the *Henderson,* 60 C.2d 482, doctrine, he should not be required to take the risk of a long prison term to exercise that right. Thus, it is not true that when a trial court grants a motion for a new trial that the parties are placed in the same position as if no trial had been had. The California courts have already held that a special form of jeopardy attaches at *both* the trial and appellate levels, and that that form of jeopardy

prevents the imposition of a more severe punishment at retrial.

The People argued in opposition to the Petition that the function of the trial judge in ruling on a motion for a new trial and granting said motion because of insufficiency of the evidence, and that of an appellate court reversing a conviction based on insufficiency of the evidence are drastically different. Your Petitioner contends that if, for some reason, there is a heavier burden when the Court of Appeal reverses a conviction and remands for trial based on insufficiency of the evidence than when the trial judge reverses a conviction and grants a new trial, that difference is wholly accountable for by what the trial judge has before him in ruling on the motion for new trial as opposed to what the Appellate Court has before it when it reverses a conviction.

The trial judge has personally observed every one of the witnesses. He's heard their testimony. He's heard the argument of counsel. He observed and heard the defendant. No one is more familiar with the facts and legal issues involved than he. When he rules on a motion for a new trial and grants the new trial based on insufficiency of the evidence to sustain the conviction, he has the tremendous benefit of having personally been there and of having seen and heard everything that took place.

On the other hand, if there is a weightier burden to be met in inducing an appellate reviewing court to reverse a conviction and remand for trial, that is due in large part to the equities of the situation. The reviewing court has not observed any witnesses, it has not heard nor observed the

arguments of counsel, and has not heard nor observed the demeanor of either the prosecutrix or of the accused. If the burden is heavier in the one case than in the other, it is accountable for and balanced by the entire situation.

This very distinction has been illustrated by a number of California cases. The case of *People v. Mattmueller,* 25 C.A.2d 418 states the following:

> "Even though the reader of the cold record might conclude that the evidence was ample to sustain the conviction, reversal of the order granting a retrial is not warranted. The judge who presided at the trial of the cause and who had the opportunity of observing the demeanor and manner of witnesses as they testified and of discovering the motives that may have animated them in giving their testimony and the interest, if any, which they had in the outcome of the case occupied a *superior* position to that which a reviewing tribunal occupies in deciding whether or not a retrial is justified. For all that appears the trial judge may have disbelieved the testimony offered by appellant's witnesses or he may have concluded that the explanation given by respondent and his witnesses raised a reasonable doubt of respondent's guilt. These were matters which were confided to his discretion, and it may not be declared from the record here presented that he abused such discretion."

The case of *People v. Cesena,* 18 C.A.2d 727, carries this analysis one step further wherein it states that if the trial judge is not satisfied that the evidence as a whole was sufficient to sustain the verdict, the granting of a new trial is not merely a proper exercise of legal discretion, rather it is a duty incumbent upon the trial judge by virtue of the office which he holds.

Finally, the case cited by the Appellate Court, to wit, *People v. Sarazzawski,* 27 C.2d 7, 161 P.2d 934, for the proposition that a trial court can grant a motion for a new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution needs to be explained. In that case, the court did in fact find that there was legally sufficient evidence which amply supported the verdict and judgment but in the Supreme Court's words, "regrettably, we find in the record several incidents which should not have occurred in a fair and orderly trial. At least two of such incidents are matters of such grave moment as to amount to substantial departures from the established elements of a fair trial, to which every person charged with crime, no matter how rich or poor, virtuous or debased, is entitled." In that case even though there was legally competent evidence, there was such substantial trial error that the judgment had to be reversed. Evidence can be legally sufficient, but it should come as no great surprise that reversal is nonetheless mandated because of substantial and prejudicial trial error.

In conclusion, petitioner refers this court to the article cited by this court, the Supreme Court of the United States in the *Burks* decision, Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U.Chi.L. Rev. 365 (1964). Compare the reasoning of the author therein to the reasons now advanced by your Petitioner in support of his double jeopardy defense as a result of a trial court reversal for insufficient evidence. That article presents each one of the arguments which *prior* to *Burks* compelled the United States Supreme Court to deny

a defendant's double jeopardy pleas when a new trial was ordered after appellate reversal for insufficient evidence.

The "waiver" rationale was discredited, the article points out, in *Green v. United States,* 355 U.S. 184 (1957). A choice between jail and second jeopardy hardly makes for a "knowing relinquishment of a right" the article continues in its analysis and points out that in fact, "usually no waiver is expressed or thought of." *Kepner v. United States,* 195 U.S. 100.

Likewise, the theory that a new trial after a conviction has been reversed is really a continuation of the first and that since the jeopardy continues, the defendant has not been placed in second jeopardy is without merit, because adherence to this theory would permit the prosecution to appeal from an acquittal, a result which has been rejected by the Supreme Court. *Kepner v. United States,* 195 U.S. 100.

Finally, the author reasoned, "equally unacceptable is the notion that a reversal wipes out the previous jeopardy." The author's reasoning was as follows:

> "The double jeopardy clause is meaningful only if every jeopardy counts. There would never be a second jeopardy if only the last counted. If the appellate court had not reversed, the defendant would have been punished. He therefore was in jeopardy."

Applying that analysis to the case at bench, if the Honorable DAVID W. LEAHY had not vacated and set aside the verdict of the jury, would not have your Petitioner been punished? He therefore was in jeopardy.

Next, the author proceeded to weigh the equities in an appellate reversal due to trial error and an appellate reversal where there was insufficient evidence to sustain the verdict. The author offered these thoughts which are equally applicable to the situation where a trial court vacates a conviction and grants a new trial due to insufficiency of the evidence as opposed to trial error:

> "The burdens on the defendant which the amendment was designed to prevent must be balanced against the public interest in protecting society from those guilty of crimes. When this balancing concept is applied to the problem of a new trial after appellate reversal, the practice of permitting new trials where the reversal was due to error can be justified. But a new trial after a reversal for insufficient evidence cannot be justified . . .
>
> ". . . Underlying the idea that the objective of protecting society from those guilty of crime would be substantially frustrated by releasing those defendants whose convictions have been reversed for error is the belief that errors which courts hold to be reversible may have little or no relation to the issue of guilt or innocence. When a jury weighs the evidence and concludes that a defendant is guilty, the prosecution has probably met its burden of proof even if reversible errors marred the trial. At least there is a good chance that the defendant is guilty that to release him without a trial would substantially impair the efficiency of the criminal law. The definition of reversible error provides support for this thesis. A conviction must be reversed if an appellate court feels that an error has had substantial influence upon the jury or if one cannot say, with fair assurance, that the judgment was not substantially swayed by error. *Kotteakos v. U.S.*, 328 U.S. 750. Moreover, an error may be reversible even if there is enough other evidence, properly admitted, to sustain a conviction. Under such a standard, it seems quite likely that many convictions are reversed even though the prosecution has satisfied its burden of proof and even though the absence of the error would not have changed the verdict of the jury.

> "If the possibility of a new trial after reversal were constitutionally barred, there would be serious and detrimental consequences from either of two courses appellate courts might follow. Criminals would escape punishment if errors that now are cause for reversal became cause for acquittal since reversible error may often have little relation to innocence . . .
>
> ". . . In contrast, the considerations which justify a new trial after a reversal for error are lacking where the reversal is for lack of evidence. Instead of a presumption that the burden of proof of the prosecution has probably been met, the appellate court is specifically holding that the burden has not been met. *Society should have no more fear of releasing such a defendant than if releasing a defendant who has been acquitted by a jury, perhaps even less since a jury acquittal may be based on error or on an improper weighing of the evidence.* Yet in the federal system and in most states, no appeal is allowed the state after an acquittal. Kepner v. U.S., 195 U.S. 100 (1904) . . .
>
> ". . . No undue burden is imposed on society by releasing those defendants whose convictions have been reversed for lack of evidence. The oppression and harassment which the double jeopardy clause was designed to prevent is clearly present in a new trial following a reversal for insufficient evidence. For in the insufficient evidence case, an appellate court is in essence

saying, 'well, the prosecution did not prove you guilty this time, but they can have another chance.' "

In either case, it cannot be said that the prosecution can complain of prejudice, "for it has been given one fair opportunity to offer whatever proof it could assemble . . ." *Burks v. United States,* 437 U.S. 1, 98 S.Ct. 2141. Having failed to produce sufficient evidence to sustain a conviction, should the prosecution now be given another opportunity to bring in new witnesses and new evidence in an attempt to convict an accused on the same charges once again? As quoted hereinabove, "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent, he may be found guilty." (*Curry v. Superior Court*, 2 C.3d 707, 87 Cal.Rptr. 361, 470 P.2d 345).

That is exactly what the State proposes to do in the case at bench, and unless prohibited from doing so, will proceed in direct violation of your Petitioner's constitutional rights.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

July 23, 1979

ROBERT L. MEZZETTI
Counsel for Petitioner

(Appendices Follow)

Appendices

APPENDIX A

In the Superior Court of the State of California
In and for the County of Santa Clara

No. 66600

The People of the State of California,
Plaintiff,

vs.

Mitchell G. Veitch,
Defendant.

ORDER OF COURT

After trial by jury, defendant was convicted of violations of California Penal Code Sections 459 (Burglary), 261.2-261.3 (Forcible Rape and Rape by Threats), 459 (Burglary), 220 (Assault with Intention to Commit a Felony), 288A (Forcible Oral Copulation), 264.1 (Acting in Concert) and the use of a deadly weapon. The jury returned the verdict on February 3, 1978.

Defendant moved for a new trial and on April 26, 1978, the Trial Judge made an order granting a new trial. The order granting the new trial contained the following language: "It is hereby ordered that the motion for new trial on behalf of defendant Mitchell Veitch is granted pursuant to California Penal Code Section 1181(6), in that the Court finds that the verdict of the jury is contrary to law and evidence;

"It is further ordered that the verdict of the jury is vacated and set aside, because it is contrary to the law

and evidence and, further, on the grounds of insufficiency of the evidence to support the verdict".

The People having a statutory right to appeal from an order granting a new trial (Penal Code Section 1238(3) filed no appeal and, after numerous motions by the defendant, the matter was assigned for trial.

On July 31, 1978, defendant filed a motion for hearing on special defense pleading judgment of acquittal of charges pursuant to Penal Code Section 1016(3) or once in jeopardy Penal Code Section 1016(4). At the request of the People, defendant's motion was continued for hearing until August 24, 1978. In the interim period, the People filed points and authorities in opposition to defendant's motion. Argument was presented and the matter was submitted on August 24, 1978.

Defendant contends that the case cannot again be tried and that a retrial is prevented by reason of certain decisions of the United States Supreme Court, decided June 14, 1978. Those decisions are *Burks v. United States,* 437 U.S., and *Greene v. Massey,* 437 U.S. The full text of said opinions are reported in "The United States Law Week", 46 LW 4632 and 46 LW 4636.

At the time that defendant's motion for new trial was presented and granted, the law of California and the United States was clear. A defendant who made a motion for a new trial impliedly waived any objection to being retried. As the Court stated in *People v. Serrato* (9 C3 753 at 759) "It is a familiar principle that a defendant who has succeeded in having his conviction set aside impliedly waives any objection to being retried on the charge of

which he was convicted." As authority, the Court relied upon *Forman v. United States,* 361 U.S. 416.

The Serrato Court (page 761) further held: "If the Trial Court, after hearing the motion under Section 1181, grants a new trial upon the ground that the verdict is contrary to the evidence, the decision is not an acquittal and is not a bar to a retrial for the offense of which the defendant has been convicted. This is so even though the decision may imply that the Trial Court has reweighed the evidence and has found that it does not establish the defendant's guilt of any offense."

The United States Supreme Court had consistently held that a defendant who requested a new trial could not then set up the defense of double jeopardy and legally frustrate what he had brought about by his request. A discussion of the Supreme Court's previous holdings is a central issue in the decision in *Burks v. United States.* After such discussion, the Court held "Nonetheless, as the discussion in Part II, supra, indicates, our past holdings do not appear consistent with what we believe the Double Jeopardy Clause commands. A close re-examination of those precedents, however, persuades us that they have not properly construed the clause, and accordingly should no longer be followed." After distinguishing "trial error" from "evidentiary insufficiency", the Court ruled *"In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case.* (Emphasis added.) As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination

that a defendant has been convicted through a judicial process which is defective in some fundamental respect, e.g., incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. See Note, Double Jeopardy: A New Trial After Appellate Reversal for Insufficient Evidence, 31 U. Chi. L. Rev. 365, 370 (1964).

"The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble. (Emphasis added.) Moreover, such an *appellate reversal* (emphasis added) means that the Government's case was so lacking that it should not have even been *submitted* to the jury. *Since we necessarily afford absolute finality to a jury's verdict of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.* (Emphasis added.)

"The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a Federal Court's role in deciding whether a case should be considered by the jury is quite limited. Even the Trial Court, which has heard the testimony of witnesses first-hand, is not to weigh the evidence or assess the credibility of wit-

nesses when it judges the merits of a motion for acquittal. See *United States v. Wolfenberger,* 426 F.2d 992, 994 (CA6 1970); *United States v. Nelson,* 419 F. 2d 1237, 1241 (CA9 1969); *McClard v. United States,* 386 F. 2d 495, 497 (CA8 1968); *Curley v. United States,* 160 F. 2d 229, 232-233, 81 U.S. App. D.C. 389, 392 (cert. denied, 331 U.S. 837 (1947)). The *prevailing rule has long been that a District Judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury finding the defendant guilty beyond a reasonable doubt.* (Emphasis added.) See C. Wright, Federal Practice and Procedure, Section 467, at 259-260; e.g. *Powell v. United States,* 418 F. 2d 470, 473, 135 U.S. App. D.C. 254, 257 (1969); *Crawford v. United States,* 375 F. 2d 332, 334, 126 U.S. App. D.C. 156, 158 (1967). Obviously, a Federal Appellate Court applies no higher a standard, rather it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. See *Glasser v. United States,* 315 U.S. 60, 80 (1942). While this is not the appropriate occasion to re-examine in detail the standards for appellate reversal on grounds of insufficient evidence, it is apparent that such a decision will be confined to cases *where the prosecution's failure is clear.* (Emphasis added.) Given the requirements for entry of a judgment of acquittal, the purposes of the Clause would be negated were we to afford the Government an opportunity for the proverbial 'Second bite at the apple.'

"In our view it makes no difference that a defendant has sought a new trial as one of his remedies, or even as the sole remedy. It cannot be meaningfully said that a per-

son 'waives' his right to a judgment of acquittal by moving for a new trial. See *Greene v. United States,* 355 U.S., at 191-198. Moreover, as *Forman,* supra, at 425, has indicated, an Appellate Court is authorized by Section to 'go beyond the relief sought' in order to provide that relief which would be 'just under the circumstances.' *Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing Court has found the evidence legally insufficient, the only 'just' remedy available for that Court is the direction of a judgment of acquittal.* (Emphasis added.) To the extent that our prior decisions suggest that by moving for a new trial, a defendant waives his right to a judgment by acquittal on the basis of evidentiary insufficiency, those cases are overruled.

"Accordingly, the judgment of the Court of Appeals is reversed and the case remanded for proceedings consistent with this opinion."

Contemporaneous with the opinion filed in *Burks v. United States,* the Supreme Court filed its opinion in *Greene v. Massey,* 437 U.S. The Court stated: "We granted certiorari to decide whether a State may retry a defendant after conviction has been *reversed by an Appellate Court* (emphasis added) on the ground that the evidence introduced at the prior trial was insufficient, as a matter of law, to sustain the jury's verdict."

Defendant Greene was found guilty of murder in the first degree and sentenced to death. On appeal to the Florida Supreme Court, the judgment was reversed and a new trial ordered. The case was remanded for new trial, the Supreme Court of Florida having found that the evidence was lack-

ing to establish beyond a reasonable doubt that defendant committed murder in the first degree. Before the new trial, defendant Greene unsuccessfully sought a writ of prohibition claiming the new trial would violate the Double Jeopardy Clause of the Federal Constitution. The Florida District Court of Appeal denied the writ—"Considering the case in this posture, the Court indicated that it could find no precedent in Florida law which would bar a retrial on double jeopardy grounds." The Florida Supreme Court denied certiorari without comment.

After retrial and conviction of first degree murder and a life sentence, the defendant Greene applied for a writ of habeas corpus in the United States District Court which denied the application, and thereafter appealed to the District Court of Appeals which held that a new trial had been a constitutionally permissible remedy. The United States Supreme Court granted certiorari to review the judgment of the United States Court of Appeals.

The *Greene* Court ruled: "In *Burks v. United States,* ante at 437 U.S., decided today we have held that the Double Jeopardy Clause precludes a second trial *once a reviewing Court* (emphasis added) has determined that the evidence introduced at trial was insufficient to sustain the verdict. Since the constitutional prohibition against double jeopardy is fully applicable to State criminal proceedings, *Benton v Maryland,* supra, we are bound to apply the standard announced in *Burks* to the case now under review."

"If we were confronted only with the per curiam opinion of the Florida Supreme Court, reversal in this case would

follow. The per curiam disposition standing by itself leaves no room for interpretation by us other than that a majority of the State Supreme Court was of the view that the evidence was definitely lacking in establishing beyond a reasonable doubt that the defendants committed murder in the first degree. By using the precise terminology 'lacking in establishing beyond a reasonable doubt', the highest Court in Florida seems to have clearly said that there was insufficient evidence to permit the jury to convict petitioner at his first trial. The dispositive per curiam opinion makes no reference to the trial errors raised on appeal. Viewed in this manner, the reasoning enunciated in *Burks* would obviously compel the conclusion that *Greene's* second trial violated the Double Jeopardy Clause."

Because of various interpretations that could be placed on the actions of the several Florida Appellate Courts, the case was remanded to the Court of Appeals for reconsideration in light of the Court's opinion and decision in *Burks v. United States.*

In a concurring opinion, Mr. Justice Rehnquist states: "For the reasons stated by Mr. Justice Powell in *Crest v. Bretz,* No. 76-1200, I do not agree with the Court's premise ante p. 5, that 'the constitutional prohibition against double jeopardy is fully applicable to State criminal proceedings.' Even if I did agree with that view, I would want to emphasize more than the Court does in its opinion the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence both at the trial level and on appeal in the 50 different States of the Union. Thus to the extent that the Florida practice in this regard differs from practice in the Federal system, the impact of

the Double Jeopardy Clause may likewise differ with respect to a particular proceeding. I, therefore, concur only in the Court's judgment."

It is clear from the majority opinion that "the constitutional prohibition against double jeopardy is fully applicable to State criminal proceedings". To be fully applicable, however, the State criminal proceedings must clearly fall within the ambit of the law comanded by *Burks* and *Greene.*

It would certainly come as a surprise to a California Trial Judge that an order granting a new trial was an order preventing a new trial or a judgment of acquittal. As the law appeared on April 26, 1978, such would not be a contemplated result and it must be seen whether or not such a result now emerges. It is conceded that judicial surprise is not a matter of great moment and has no persuasive effect, however, when that surprise is due to the requested abandonment of sound legal principles and departure from existing California law, it must be carefully examined.

Defendant's argument equates a decision of a Trial Judge in California in granting a motion for a new trial on the ground of insufficiency of the evidence with the action of the Appellate Courts of Florida and the United States. There is no authority for this position other than an "ipse dixit".

The California law as stated in *People v. Serrato* (supra) indicates that an order granting a new trial by a Trial Judge is not a judgment of acquittal and does not bar a retrial even if the decision implies that the Trial Court has reweighed the evidence and found that it does not establish the defendant's guilt of any offense. In *Burks* and *Greene,*

the Supreme Court is not concerned with Trial Court action but that of appellate review and by the appellate standards. Neither *Burks* or *Greene* stand for the proposition that an order granting a new trial by a Trial Judge is tantamount to a judgment of acquittal nor do they refer to or analyze the distinctions inherent in that action. In California, Penal Code Section 1118.1 encompasses the exclusive statutory authority for the rendition of a judgment of acquittal by a Court and not Penal Code Section 1181(6). As pointed out in *Serrato,* supra (page 761), "Though the Trial Court, by reason of its greater familiarity with the trial proceedings, may grant a new trial under circumstances which an Appellate Court would refuse to act, each Court is exercising a reviewing function when it exercises its power under subdivision 6. The consequences of a ruling made under the authority of this section must necessarily be *limited to those contemplated by the statute.*" (Emphasis added.)

While the decision in *Burks* may remove any further reliance upon the principle of *Forman v. United States,* i.e., "that the defendant who succeeds in having his conviction set aside impliedly waives any objection to being retried on the same charge of which he was convicted", it does not address nor reach the precise issue before this Court. Nor does Greene.

In both cases it is apparent that the Trial Court had refused to grant the requested relief to the defendant. In each case the Courts of review made a finding that the Trial Court was in error and, after review by appellate standards, granted the relief requested. It was then, and only then, that the high Court announced the rule of law which

precludes retrial after an appellate finding on the insufficiency of the evidence.

The case at bench illustrates the disparate functions of appellate review and Trial Court action and points clearly to the inapplicability of *Burks* and *Greene* to the issue here. In California—as in Florida (Florida Rules of Criminal Procedure Rule 3.580, Rule 3.600, and Rule 3.380), provision is made for judgment of acquittal and for motions for new trials upon various grounds. In California, Section 1811(6) of the Penal Code is a statute enacted solely for the protection of the accused. If convicted, the defendant can make application for a new trial and the Trial Judge is vested with discretion in the grant or denial of that motion. If relief is denied, the sufficiency of the evidence to sustain the conviction is subject to appellate review. If the Appellate Court determines, under appellate standards, that the evidence is insufficient and that the Trial Court was in error, it is now clear under *Burks* and *Greene* that the case cannot be tried again. Defendant's argument that the granting of a new trial by the Trial Judge is equivalent in law to the procedure just outlined is erroneous. To so hold would emasculate the provisions of Penal Code Section 1181(6) and render this valuable judicial tool impotent. Such a result, in my view, is not commanded by *Burks* or *Greene,* by California law, or by justice.

Defendant's motions are denied.

DATED: This 7th day of September, 1978.

JAMES A. WRIGHT
Judge of the Superior Court

APPENDIX B

In the Court of Appeal
of the
State of California

Division Two

1 Civil No. 45108

Santa Clara
Superior Court No. 66600

Mitchell G. Veitch,
Petitioner,
vs.
Superior Court, County of Santa Clara,
Respondent,
People of the State of California,
Real Party in Interest.

[Filed October 25, 1978]

BY THE COURT:

The petition for alternative writ of mandate and/or prohibition is denied. (P.C. sec. 1180, People v. Serrato (1973) 9 Cal.3d 753, 761; Auto Equity Sales, Inc. v. Superior Court (1962) 57 Cal.2d 450, 455.)

Dated, October 25, 1978

TAYLOR, P. J.

APPENDIX C

1st Civil No. 45108

In the Supreme Court of the State of California

In Bank

Veitch

v.

The Superior Court of Santa Clara County

[Filed November 24, 1978]

Petition for hearing granted. The matter is transferred to this court and retransferred to the Court of Appeal, First District, Division Two, with directions to issue an alternative writ of prohibition to be heard before that court when the proceeding is ordered on calendar.

Tobriner, *Justice*

Mosk, *Justice*

Clark, *Justice*

Richardson, *Justice*

Manuel, *Justice*

Newman, *Justice*

APPENDIX D

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

1 Civil No. 45108

Mitchell G. Veitch,
Petitioner,

vs.

Superior Court of the County of Santa Clara, State of California,
Respondent.

People of the State of California,
Real Parties in Interest.

[Filed December 1, 1978]

BY THE COURT:

Let an alternative writ of prohibition issue as prayed for, to be heard before Division Two of this court on Tuesday, January 9, 1979, at 10:00 a.m. The alternative writ is to be issued, served and filed on or before December 8, 1978. The written return, if any, to the alternative writ is to be served and filed on or before December 28, 1978.

Dated, December 1, 1978

TAYLOR, P. J.

APPENDIX E

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

1 Civil No. 45108

Mitchell G. Veitch,
Petitioner,

vs.

Santa Clara County Superior Court,
Respondent,

People of the State of California,
Real Party in Interest.

[Filed December 7, 1978]

ALTERNATIVE WRIT OF PROHIBITION

The People of the State of California to the Superior Court of the State of California, County of Santa Clara, Greeting:

The petition for a writ of prohibition on file herein having been considered and good cause appearing for the issuance of this alternative writ of prohibition,

WE DO COMMAND YOU that pending further order of this Court you desist and refrain from taking any further action including further trials with regard to the

charges of which petitioner has already been placed once in jeopardy in Santa Clara County Superior Court Action No. 66600, People v. Mitchell G. Veitch,

and that you show cause before Division Two of this Court on Tuesday, January 9, 1979, at 10:00 a.m. in its courtroom in the State Building, San Francisco, California, why you should not be permanently restrained from doing so.

The written return, if any, to this alternative writ is to be served and filed on or before December 28, 1978.

Witness the Honorable Wakefield Taylor, Presiding Justice of the Court of Appeal of the State of California, First Appellate District, Division Two.

Attest my hand and the Seal of this Court this 1st day of December, 1978.

(Seal) Clifford C. Porter, *Clerk*

By D. J. Gulliford, *Deputy Clerk*

APPENDIX F

Certified for Publication

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

1 Civil No. 45108

Mitchell G. Veitch,
Petitioner,
vs.
Superior Court of the County of Santa Clara, State of California,
Respondent.
People of the State of California,
Real Party in Interest.

[Filed Feb. 26, 1979]

Petitioner, aggrieved by an order of respondent court rejecting his pleas of former judgment of acquittal (Pen. Code, § 1016, subd. 4) and once in jeopardy (Pen. Code, § 1016, subd. 5), petitioned this court for a writ of prohibition to prevent his retrial (Gomez v. Superior Court (1958) 50 Cal.2d 640, 653). We summarily denied relief. Petitioner thereupon sought a hearing in the Supreme Court. The Supreme Court, by order dated November 24, 1978, granted the petition for hearing and directed this court to issue an alternative writ of prohibition.

On February 3, 1978, after a trial by jury, a verdict was rendered against petitioner finding him guilty of violations of California Penal Code sections 459 (burglary), 261, subdivisions 2, 3 (forcible rape and rape by threats), 459 (burglary), 220 (assault with intention to commit rape), 228a (forcible oral copulation), 264.1 (acting in concert), and 12022 (armed with a deadly weapon. On April 26, 1978, upon petitioner's application, respondent court granted a new trial pursuant to the provisions of Penal Code section 1181, subdivision 6, on the ground that the verdict was contrary to law and evidence, "further, on the grounds of insufficiency of the evidence to support the verdict." Thereafter, on June 14, 1978, the United States Supreme Court decided Burks v. United States (1978) 437 U.S. 1 [98 S.Ct. 2141] and Greene v. Massey (1978) 437 U.S. 19 [98 S.Ct. 2151]. Burks held that the Double Jeopardy Clause precludes a second trial once a *reviewing court* has determined that the evidence introduced at trial was insufficient to sustain the verdict. Greene applied the standard announced in Burks to a Florida state court proceeding.

On July 31, 1978, after becoming aware of these new cases, petitioner filed a "Motion For Hearing On Special Defense Pleading Judgment of Acquittal of Charges Pursuant to P.C. 1016(3) Or Once In Jeopardy P.C. 1016(4)."[1] On August 24, 1978, the motion was argued and respondent court issued its opinion denying the motion on September 7, 1978.

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[1]Penal Code section 1016 provides: "There are six kinds of pleas to an indictment or an information. . . .

"4. A former judgment of conviction or acquittal of the offense charged.

"5. Once in jeopardy."

Petitioner contends that Burks and Greene stand for the proposition that the Double Jeopardy Clause precludes a second trial once a *trial court* has granted a motion for new trial on the ground of insufficiency of the evidence. Respondent court, after examining the comprehensive nature of California's statutory scheme relating to motions for judgment of acquittal and motions for new trial and the manner in which California practices differ from the practices employed in the federal courts and Florida, concluded that motions for new trial (Pen. Code, § 1181, subd. 6) may not be equated with motions for judgment of acquittal (Pen. Code, § 1118.1), and that to so hold would render impotent a valuable judicial tool, enacted for the protection of the accused. We agree.

A motion for new trial is a legislatively established procedure which may be invoked by any convicted defendant (People v. Sarazzawski (1945) 27 Cal.2d 7, 17). The power of a California trial court to hear and decide a motion for new trial in a criminal case is strictly limited to the authority granted by Penal Code section 1181 (People v. Serrato (1973) 9 Cal.3d 753, 760; People v. Amer (1907) 151 Cal. 303, 305).[2]

"By case law it is established that the standard of review by a trial court acting under this section is different from the standard used by an appellate court under the same section. In ruling upon a motion for a new trial, the trial court is required to *independently weigh the evidence,* but

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[2]Penal Code section 1181 provides in relevant part: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only: . . . [¶] 6. When the verdict or finding is contrary to law or evidence. . . ."

an appellate court will not . . . set aside the verdict if there is any substantial evidence to support it. [Citations.]" (People v. Serrato, supra, p. 761; emphasis added.) In Serrato, the Supreme Court, examining the consequences of ruling made under the authority of this section, concluded that "If the trial court, after hearing the motion under section 1181, grants a new trial upon the ground that the verdict is contrary to the evidence, *the decision is not an acquittal and is not a bar to a retrial for the offense of which the defendant had been convicted.* This is so even though the decision may imply that the trial court has reweighed the evidence and has found that it does not establish the defendant's guilt of any offense" (People v. Serrato, supra, p. 761; emphasis added). The court went on to state: "The function of a jury, when it finds the evidence insufficient, is to acquit. By contrast, the function of the court, ruling on a motion for new trial is to grant a new trial if it finds the evidence insufficient. *A court reviewing the verdict under section 1181 has no authority to acquit the defendant* expressly, impliedly or inadvertently" (p. 762; emphasis added).

The foregoing authority accords with the statutory command of Penal Code section 1180, which provides that "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the *former verdict* or finding *cannot* be used or referred to, either in evidence or in argument, or *be pleaded in bar of any conviction which might have been had under the accusatory pleading*" (emphasis added). Thus, the granting of a new trial has the same effect as a mistrial.

The granting of a motion for judgment of acquittal pursuant to the provisions of section 1118.1, on the other hand, has entirely different consequences. These consequences flow from different standards employed by the trial court in ruling upon a motion for judgment of acquittal. "The 'test to be applied by the trial court under [§ 1181.1] is . . . *the same test applied by an appellate court in reviewing a conviction:* whether from the evidence, including reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged [citations].'" (Emphasis added.) (People v. Lines (1975) 13 Cal.3d 500, 505.)[3] The People concede that the granting of a motion for judgment of acquittal pursuant to the provisions of section 1118.1 would bar another prosecution for the same offenses; indeed, such a result is compelled by statute (Pen. Code, § 1118.2; People v. Moran (1973) 33 Cal.App.3d 724, 728).[4]

It is readily apparent that the statutory procedures governing motions for new trial differ from the procedures governing motions for judgment of acquittal and that dif-

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[3]Added to the Penal Code in 1967 and replacing the procedure under former section 1118 providing for the court's nonbinding advice to the jury to acquit, section 1118.1 provides: "In a case tried before a jury, the court on motion of the defendant or on its own motion, at the close of the evidence on either side and before the case is submitted to the jury for decision, shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such offense or offenses *on appeal.* If such a motion for judgment of acquittal at the close of the evidence offered by the prosecution is not granted, the defendant may offer evidence without first having reserved that right." (Emphasis added.)

[4]Section 1118.2, in pertinent part, provides: "A judgment of acquittal entered pursuant to the provisions of Section . . . 1118.1 shall not be appealable and is a bar to any other prosecution for the same offense."

ferent consequences flow from each procedure. California's statutory procedures thus vary from the federal procedures considered in Burks and the state procedures considered in Greene, supra, 437 U.S. 19.

In Burks, supra, 437 U.S. 1, the United States Supreme Court was squarely presented with the question of whether a defendant may be tried a second time when a *reviewing court* has determined that in a prior trial the evidence was insufficient to sustain the verdict of the jury (p. 5). The court re-examined its holding in Forman v. United States (1960) 361 U.S. 416, wherein, without distinguishing between a reversal due to trial error and a reversal resulting solely from evidentiary insufficiency, the court held that a new trial did not involve double jeopardy (p. 8). The court concluded that its prior cases were correct in allowing a new trial to rectify trial error (p. 14); however, it concluded that the rule was otherwise when a defendant's conviction had been overturned due to a failure of proof at trial, as follows: "In short, reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case. As such, it implies nothing with respect to the guilt or innocence of the defendant. Rather, it is a determination that a defendant has been convicted through a judicial process which is defective in some fundmental respect, *e.g.*, incorrect receipt or rejection of evidence, incorrect instructions, or prosecutorial misconduct. When this occurs, the accused has a strong interest in obtaining a fair readjudication of his guilt free from error, just as society maintains a valid concern for insuring that the guilty are punished. . . .

"The same cannot be said when a defendant's conviction has been overturned due to a failure of proof at trial, in which case the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble.[10]" (Pp. 15-16.)

The court pointed out in Burks, however, that ". . . such an appellate reversal means that the Government's case was so lacking that it should not have even been *submitted* to the jury. Since we necessarily afford absolute finality to a jury's *verdict* of acquittal—no matter how erroneous its decision—it is difficult to conceive how society has any greater interest in retrying a defendant when, on review, it is decided as a matter of law that the jury could not properly have returned a verdict of guilty.

"The importance of a reversal on grounds of evidentiary insufficiency for purposes of inquiry under the Double Jeopardy Clause is underscored by the fact that a federal court's role in deciding whether a case should be considered by the jury is quite limited. Even the trial court, which has heard the testimony of witnesses first hand, is not to weigh the evidence or assess the credibility of witnesses when it judges the merits of a motion for acquittal. [Citations.] The prevailing rule has long been that a district judge is to submit a case to the jury if the evidence and inferences therefrom most favorable to the prosecution would warrant the jury's finding the defendant guilty beyond a reasonable doubt. [Citations.] Obviously a federal appel-

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"[10]In holding the evidence insufficient to sustain guilt, *an appellate court* determines that the prosecution has failed to prove guilt beyond a reasonable doubt. See American Tobacco Co. v. United States, 328 U.S. 781, 787 n. 4 (1946)."

late court applies no higher a standard; rather, it must sustain the verdict if there is substantial evidence, viewed in the light most favorable to the Government, to uphold the jury's decision. [Citations.] . . . Given the *requirements for entry of a judgment of acquittal*, the purposes of the Clause would be negated were we to afford the Government an opportunty for the proverbial 'second bite at the apple.'" (Pp. 16-17; emphasis added.)

It is significant that petitioner does not argue, as the defendant did in Burks, that petitioner was entitled to a judgment of acquittal, i.e., that the People's case "was so lacking that it should not have even been *submitted* to the jury" (p. 16). Although Burks made it clear that a defendant entitled to a judgment of acquittal will not be deprived of relief by the appellate court because he failed to make such a motion in the trial court or because he moved instead for a new trial, we conclude that Burks stands for the proposition that the Double Jeopardy Clause will preclude retrial only if a reversal by a *reviewing court* is grounded on the fact that the evidence presented to the jury is so insufficient that the defendant was entitled to a judgment of acquittal.

Our conclusion is fortified by the action taken by the Supreme Court in Greene, supra, 437 U.S. 19. There, the issue was whether the per curiam opinion of the Florida state Supreme Court was "tantamount to a finding that the trial court *should have directed a verdict of not guilty* and hence a second trial for first-degree murder would constitute double jeopardy" (p. 22). Because there was some question whether, under the language of the per curiam opinion it could reasonably be said that the concurring Justices thought that the *legally competent* evidence adduced at the first trial was insufficient to prove guilt, the matter was remanded to the Court of Appeals for reconsideration to resolve this question (p. 26). Moreover, Justice Rehnquist, in his concurring opinion, noted the varying practices with respect to motions for new trial and other challenges to the sufficiency of the evidence, both at the trial level and on appeal, in the 50 different states, and cautioned that "to the extent that Florida practice in this regard differs from practice in the federal system, the impact of the Double Jeopardy Clause may likewise differ with respect to a particular proceeding" (p. 27).

In Burks, supra, 437 U.S. 1, the government, by failing to cross-petition for certiorari on the question of whether the Court of Appeals was correct in holding that the government had failed to meet its burden of proof with respect to the defendant's claim of insanity, in effect conceded that in the prior trial the evidence was insufficient to sustain the verdict of the jury (see p. 5).[5] There is no such concession by the People here.[6]

Although no transcript of the testimony taken at the trial is available to us in these proceedings, the evidence in

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[5]Although the People are entitled to appeal from an order granting a new trial (Pen. Code, § 1238, subd. (a)(3)), it cannot be said that by failing to appeal the People concede that the evidence was insufficient to support the verdict. The People do not so concede; rather, they argue that an appeal from the order granting a new trial, given the wide latitude allowed to trial courts on such a motion, would have been futile, since reviewing courts are reluctant to interfere with a decision granting a motion for new trial unless there is a clear showing of an abuse of discretion (see People v. Robarge (1953) 41 Cal.2d 628, 633).

[6]In their opposition to petitioner's motions in the trial court and in these appellate proceedings, the People have continued to assert that the verdict of the jury was supported by substantial evidence.

the five-week-long trial appears to have been conflicting. It is apparent from the record that respondent court, applying the standards applicable to motions for new trial, judged the credibility of the witnesses, resolved conflicts in the testimony, independently weighed the evidence, and drew factual inferences opposed to those drawn by the jury. In passing upon a motion for new trial, the trial court has very broad discretion and is not bound by conflicts in the evidence (People v. Robarge, supra, 41 Cal.2d, pp. 633-635). A trial court can grant a motion for new trial where the evidence is legally sufficient and even where the only evidence is that of the prosecution (People v. Sarazzawski, supra, 27 Cal.2d, p. 16). The granting of a motion for new trial, where the trial court has independently weighed the evidence, cannot be equated with the granting of a motion for judgment of acquittal, where the trial court must apply the same test applied by an appellate court in reviewing a conviction.

In summary, after a trial by jury, a verdict was rendered against petitioner finding him guilty as charged of numerous felonies. Upon petitioner's application, the trial judge granted a motion for new trial, pursuant to the provisions of Penal Code section 1181, subdivision 6, on the ground of insufficiency of the evidence to support the verdict. The grant of the motion for new trial, by a trial court not bound by the jury's decision as to conflicts in the evidence or inferences to be drawn therefrom and under a duty to give defendant the benefit of its *independent* conclusion as to the sufficiency of credible evidence to support the verdict, was not the equivalent of a judgment of acquittal authorized pursuant to Penal Code section 1118.1, upon which retrial is barred (Pen. Code, § 1118.2). We hold that petitioner may be retried for the same offenses of which he has been convicted (Pen. Code, § 1180), and that a second trial will not violate constitutional guarantees against double jeopardy (U.S. Const., 5th Amend.; Cal. Const., art. I, § 15).

The alternative writ is discharged and the peremptory writ is denied.

CERTIFIED FOR PUBLICATION.

Taylor, P. J.

WE CONCUR:

Kane, J.

Rouse, J.

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Veitch v. Superior Court
(People of the State of California)
1 Civil No. 45108

APPENDIX G

In the Court of Appeal
of the
State of California

First Appellate District

Division Two

1 Civil No. 45108

Superior Court No. 66600

Mitchell G. Veitch,
Petitioner,

vs.

Superior Court, County of Santa Clara,
Respondent,

People of the State of California,
Real Party in Interest.

[Filed March 28, 1979]

BY THE COURT:

The petition for rehearing filed in the above entitled cause is hereby denied.

Dated, March 28, 1978

TAYLOR, P. J.

APPENDIX H

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING
SAN FRANCISCO, CALIFORNIA 94102

APR 26 1979

I have this day filed Order

HEARING DENIED

In re: 1 Civ *No.* 45108

Veitch

vs.

Superior Court-Santa Clara

Respectfully,

G. E. BISHEL
Clerk